No. 84-6864

NO. A-815

RECEIVED
JUN 4, 1985
JUN 5 1985
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

October Term, 1984

ERNEST BUSBY,
Petitioner

vs.

STATE OF LOUISIANA,
Respondent

Petition for Writ of Certiorari To The Louisiana Supreme Court

---

MARK G. MUROV
RITA K. WARD
833 Baronne Street
New Orleans, Louisiana 70113
(504) 581-1274

TABLE OF CONTENTS

	Page
Question Presented	1
Table of Authorities	2
Citation of Opinion Below	3
Jurisdiction	3
Constitutional and Statutory Provisions Involved	4
Statement of the Case	4
A. The Crime	4
B. Summary of Pertinent Legal Proceedings	4
Reasons for Granting the Writ	4
Conclusion	7
Appendices	
Appendix A-Opinion of the Louisiana Supreme Court, January 14, 1985	
Appendix B-Statutory Provisions Involved	

QUESTION PRESENTED

Does the petitioner's sentence of death, which was upheld by the Louisiana Supreme Court, violate the Eighth and Fourteenth Amendments of the United States Constitution where the Trial Court, in clear contravention of Louisiana law, refused, on timely request, the defendant's requested jury charge concerning the penalties for first and second degree murder, including a charge that second degree murder carried a mandatory sentence of life imprisonment, without benefit of probation, parole or suspension of sentence?

TABLE OF AUTHORITIES

	Page
Cases:	
State v. Lemelle, 353 So.2d. 1312, (La. 1977)	6
State v. Williams, 392 So.2d. 619, (La. 1980)	6
Statutes:	
Article 807, Louisiana Code of Criminal Procedure.	4, 6
Louisiana Revised Statutes 14:30	4
Louisiana Revised Statutes 14:30.1	4

NO. A-815

In The

Supreme Court of the United States

October Term, 1984

ERNEST BUSBY,
Petitioner

v.

STATE OF LOUISIANA,
Respondent

Petition for Writ of Certiorari To
The Louisiana Supreme Court

Petitioner, Ernest Busby, prays that a writ of certiorari issue to review the judgment of the Louisiana Supreme Court affirming his conviction and sentence on January 14, 1985, and denying rehearing on March 7, 1985.

CITATION TO OPINION BELOW

The opinion of the Louisiana Supreme Court is reported at 464 So.2d. 262 (La. 1985) and is attached as Appendix A.

JURISDICTION

The judgment of the Louisiana Supreme Court was entered on January 14, 1985. The application for rehearing was denied on March 7, 1985. A timely application for extension of time in which to file a petition for a writ of certiorari was filed with this Honorable Court within the sixty (60) day period for filing an application for a writ of certiorari.

The original expiration date for filing was thereafter extended thirty (30) days, or until June 4, 1985 by the Honorable Byron R. White, Associate Justice of the United States and Circuit Justice for the Fifth Circuit. This Court's jurisdiction is invoked pursuant to 28 U.S.C. Section 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Eighth Amendment of the United States Constitution, which provides:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and and unusual punishment inflicted;"

and the Fourteenth Amendment of the United States Constitution, which provides in pertinent part:

> "(N)or shall any state deprive any person of life, liberty or property, without due process of law. . ."

This case also involves Louisiana Revised Statutes 14:30 and 30.1, first degree murder and second degree murder, respectively, and Louisiana Code of Criminal Procedure, Article 807, special changes, and verbatim quotations of said statutes appear in the appendix hereto as Appendix B.

STATEMENT OF THE CASE

A. The Crime: On December 1, 1983, the defendant was squirrel hunting with the victim, John Reeves, in a rural location in Vernon Parish, Louisiana. While hunting Busby shot Reeves in the back from twelve feet away with a twenty gauge shotgun.

B. Summary of Pertinent Legal Proceedings: The defendant requested a special jury charge stating the elements of the crimes of first degree murder and the penalties for each. The Trial Judge refused the request, although defense counsel was allowed to argue the content of the requested charge to the jury.

REASONS FOR GRANTING THE WRIT

The Louisiana Supreme Court unanimously agreed that defendant was entitled, under the Louisiana Code of Criminal Procedure, Article 807, to an instruction of law which is "wholly correct and pertinent" and which does not require "qualification, limitation or explanation". The requested

charge would have instructed the jury that a second degree murder verdict, responsive to the crime of first degree murder, would result in a mandatory life sentence without benefit of parole, probation or suspension of sentence. The majority opinion of the State Supreme Court concludes that the admitted error was harmless, because defense counsel was permitted to argue the mandatory life sentence to the jury.

In his insightful dissenting opinion, Justice Pascal Calogero notes that if merely one juror had been swayed to persist in a finding of second degree murder, Mr. Busby would not have been convicted of first degree murder and thereafter exposed to the death penalty which was ultimately imposed.

The dissenting opinion finds that it is ... "impossible to conclude, with any degree of certainty, that the error was harmless".

Although the actual jury charges were apparently not transcribed as part of the trial record, and undersigned counsel did not appear for the defense in the trial, this Honorable Court can take judicial notice of the standard admonition and charge by trial courts throughout the U.S. to the effect that "the arguments of counsel are not law; the court will instruct [the jury] on the applicable law in this case". If any one or more jurors of the twelve <u>might</u> have returned a verdict of second degree murder based on a charge by the Court that a mandatory life sentence would result therefrom, then Mr. Busby was <u>directly</u> and <u>unequivocally</u> prejudiced by the trial court's refusal to give a lawful instruction to which he was entitled. The Louisiana legislature, in its wisdom, enacted Article 807 to give defendants the benefit of wholly correct and pertinent instructions of law. The legislature was no doubt aware of the

due process clause of the Fourteenth Amendment in creating this procedural right. Obviously, the legislature did not assume that a jury gives arguments of counsel the same weight as instructions from the court; otherwise, the defendant's right under Article 807 would not have existed.

The majority opinion of the Louisiana Supreme Court is not sensitive to the due process concept underlyir ·ticle 807. The conclusion that Mr. Busby was not prejudi· the trial court's refusal to give the pertinent charge it · supported in the record or in logic. The jurors presumab·y recognize the difference between the advocacy of defense counsel and the presumed impartiality of the Court. Justice Calogero's analysis, recognizing the clear possibility that any single juror might have returned a second degree verdict, stands the test of logic. The majority opinion, unfortunately, does not.

It is respectfully submitted that Mr. Busby's conviction under these circumstances violated the procedural due process envisioned by the State legislature in enacting Article 807. This Honorable Court is, and should be, the final arbiter of the meaning of the United States Constitution. The conclusion that no prejudice could have resulted presumes that the jurors gave no greater weight to the instructions of the Court than to the argument of counsel. This conclusion ignores existing Louisiana case law to the effect that if only one of the twelve was swayed by the failure, an error occurred, See State v. Williams, 392 So.2d. 619 (La. 1980). This conclusion ignores the decisions of this Honorable Court, the final arbiter of constitutional law, as well as ignoring other Louisiana decisions that, before a constitutional error can be held harmless, the Court must be able to declare its belief that the error was harmless beyond a reasonable doubt. State v Lemelle, 353 So.2d. 1312, 1314 (La.

1977). The majority opinion of the Louisiana Supreme Court did not address the issue of harmless error beyond a reasonable doubt. It approved a procedure which violated state law, based on an unfounded conclusion that no prejudice could possibly have resulted.

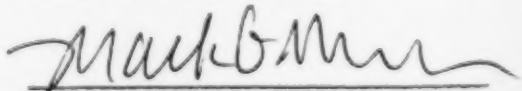
It is respectfully submitted that a proper instruction (to which Mr. Busby was unequivocally entitled under state law) might have saved his life, in the discretion of a jury of his peers. The procedure approved by the State Supreme Court does violence to the harmless error rule and to the due process clause and if left intact, will result in the supreme penalty for Mr. Busby. The United States Constitution forbids taking Mr. Busby's life without due process. A criminal defendant with a meritorious claim under the Constitution should not be forced to seek Habeus Corpus relief in post conviction proceedings when a serious procedural error stands out glaringly from the trial record.

CONCLUSION

Wherefore, defendant Ernest Busby prays that the foregoing Petition for Writ of Certiorari to the Louisiana Supreme Court be granted, and that, in due course, the January 14, 1985 decision of that Court be reversed and that petition be granted a new trial, for the reasons stated herein.

Respectfully submitted,

GILL, FABACHER & MUROV



MARK G. MUROV
RITA K. WARD
Attorneys for Ernest Busby
833 Baronne Street
New Orleans, Louisiana 70113
(504) 581-1274

STATE of Louisiana

v.

Ernest BUSBY.

No. 84-KA-1089.

Supreme Court of Louisiana.

Jan. 14, 1985.

Rehearing Denied March 7, 1985.

Defendant was convicted in the Thirtieth Judicial District Court, Parish of Vernon, Ted R. Broyles, J., of first-degree murder, and defendant appealed. The Supreme Court, Dixon, C.J., held that: (1) State's failure to include certain items of evidence among those which it told defense attorney it intended to introduce at trial did not prejudice defendant; (2) trial judge's denial of special charge detailing respective sentences on responsive verdicts returnable by jury, although incorrect, did not constitute reversible error; (3) admission of prior criminal record in opening statement of sentencing phase was inappropriate but harmless; (4) prosecutor's remarks during sentencing phase, although improper, did not inject an arbitrary factor into the proceeding; (5) means by which defendant put victim to death did not fall within category of cruel, heinous and atrocious crimes contemplated by statute; (6) evidence supported finding of aggravated circumstance so as to allow death sentence; and (7) the death sentence was not disproportionate.

Affirmed.

Lemmon, J., concurred.

Watson, J., concurred in part and disagreed in part.

Calogero, J., dissented and assigned reasons and would grant a rehearing.

1. Criminal Law ⇐594(1)

Trial judge's suggestion of continuance, instead of exclusion of particular items, was appropriate and was preferable given fact that discovery exchanges occurred within three days before trial. LSA-C.Cr.P. art. 729.5.

2. Criminal Law ⇐1166(10.10)

State's failure to comply with discovery requests does not constitute reversible error unless actual prejudice results to defendant.

3. Criminal Law ⇐1166(10.10)

State's failure, in response to defendant's discovery request, to include certain items of evidence among those which it told defense attorney it intended to introduce at trial did not prejudice defendant, since excluded items were merely cumulative, evidence against defendant was overwhelming, and omitted items were included in written notice of intent filed within three days of filing of defendant's discovery request.

4. Criminal Law ⇐1173.2(4)

Although trial judge incorrectly denied special jury charge detailing respective sentences on responsive verdicts returnable by jury since charge did not require "qualification, limitation, or explanation" and was "wholly correct and pertinent," no prejudice to defendant resulted where jury was made aware of sentences of responsive verdicts in defense counsel's closing arguments. LSA-C.Cr.P. arts. 729.5, 807 comment (c).

5. Criminal Law ⇐986.6(3)

Evidence of prior criminal record is admissible evidence in sentencing phase; it is relevant to character and propensities of offender. LSA-C.Cr.P. art. 905.2.

6. Criminal Law ⇐986.6(3), 1177

Admission of documentation of defendant's prior criminal record during opening statement of sentencing phase of trial was improper; however, error was harmless where defendant did not contend that the evidence would have been inadmissible if introduced at the proper time. LSA-C.Cr.P. art. 905.2.

7. Criminal Law ⇐1208.1(6)

If jury finds at least one aggravating circumstance it may consider recommend-

ing death penalty but is not bound to do so and can still recommend life imprisonment; additionally, if recommendation of death penalty is not unanimous, judge will impose sentence of life imprisonment without benefit of probation, parole or suspension of sentence.

8. Criminal Law ⇐723(1), 1171.1(6)

Prosecutor's comments about societal cost of life sentence, misspent tax dollars, future escapes, and more killings by defendant were improper; however, given statements by defendant that he had escaped on numerous occasions and that giving him more time was not going to bother him one bit, and his statement implying that he might have killed others, prosecutor's comment did not inject arbitrary factor into proceedings so as to invalidate death sentence. LSA-C.Cr.P. art. 905.2.

9. Homicide ⇐354

Means by which defendant put victim to death did not fall within category of cruel, heinous and atrocious crimes contemplated by statute which allows imposition of death sentence upon finding of statutory aggravating circumstance where victim was shot once in the back from distance of 12 feet with 20 gauge shotgun and it took no longer than one and one-half minutes for victim to die. LSA-C.Cr.P. art. 905.9.

10. Homicide ⇐354

Evidence, including defendant's admission that he stripped victim of his wallet which contained approximately $150, that defendant knew that victim would have large amount of cash on his person and that this was one reason defendant took victim hunting with him, and that defendant was thinking of shooting victim and taking his money, supported finding of aggravated circumstance that murder occurred during commission of robbery so as to support death sentence. LSA-C.Cr.P. art. 905.9.

11. Homicide ⇐354

Death sentence for first-degree murder committed in course of robbery was not disproportionate when compared to results of other single-shot armed robbery cases. LSA-C.Cr.P. arts. 905.2, 905.9; Sup.Ct. Rules, Rule 28 (C.Cr.P.Rule 905.9.1), 8 LSA-R.S.

William J. Guste, Jr., Atty. Gen., Barbara Rutledge, Asst. Atty. Gen., William E. Tilley, Dist. Atty., Edwin L. Cabra, Asst. Dist. Atty., for plaintiff-appellee.

James R. Mitchell, Leesville, for defendant-appellant.

DIXON, Chief Justice.

Ernest W. Busby III was convicted on February 15, 1984 of the first degree murder of John Reeves. According to the defendant's confession, Busby was angered when he discovered that Reeves had told Busby's girl friend, Ruthie Jones, that Busby had referred to her as a "whore." Busby confronted Reeves with this story, but Reeves refused to acknowledge that he had made the statement. The day after the incident Busby invited Reeves to go squirrel hunting, intending either to "stomp him with [his] hands ... or use that gun on him." While hunting Busby shot Reeves in the back from twelve feet away with a 20 gauge shotgun. Reeves "lay there gasping ... looked up at [Busby] ... asked [him] if [he] shot him ... and rolled over and died."

Busby checked Reeves' pulse, said a short prayer, and then covered the body with leaves and twigs after removing the victim's watch and a wallet containing approximately $150. Busby returned to 3B's Trailer Park where both he and the victim lived and ran a few errands, including picking the victim's daughter up from school. That evening he took his friends Danny and Gisela Humphrey out for drinks to celebrate her birthday.

On the following day Busby decided that prudence dictated that he leave Leesville. He traveled to Shreveport, using the victim's car, but was arrested by Caddo Parish authorities on December 5, 1983, four days after the shooting. The defendant was then transported back to Vernon Par-

STATE of Louisiana

v.

Ernest BUSBY.

No. 84-KA-1089.

Supreme Court of Louisiana.

Jan. 14, 1985.

Rehearing Denied March 7, 1985.

Defendant was convicted in the Thirtieth Judicial District Court, Parish of Vernon, Ted R. Broyles, J., of first-degree murder, and defendant appealed. The Supreme Court, Dixon, C.J., held that: (1) State's failure to include certain items of evidence among those which it told defense attorney it intended to introduce at trial did not prejudice defendant; (2) trial judge's denial of special charge detailing respective sentences on responsive verdicts returnable by jury, although incorrect, did not constitute reversible error; (3) admission of prior criminal record in opening statement of sentencing phase was inappropriate but harmless; (4) prosecutor's remarks during sentencing phase, although improper, did not inject an arbitrary factor into the proceeding; (5) means by which defendant put victim to death did not fall within category of cruel, heinous and atrocious crimes contemplated by statute; (6) evidence supported finding of aggravated circumstance so as to allow death sentence; and (7) the death sentence was not disproportionate.

Affirmed.

Lemmon, J., concurred.

Watson, J., concurred in part and disagreed in part.

Calogero, J., dissented and assigned reasons and would grant a rehearing.

1. Criminal Law ⇐594(1)

Trial judge's suggestion of continuance, instead of exclusion of particular items, was appropriate and was preferable given fact that discovery exchanges occurred within three days before trial. LSA-C.Cr.P. art. 729.5.

2. Criminal Law ⇐1166(10.10)

State's failure to comply with discovery requests does not constitute reversible error unless actual prejudice results to defendant.

3. Criminal Law ⇐1166(10.10)

State's failure, in response to defendant's discovery request, to include certain items of evidence among those which it told defense attorney it intended to introduce at trial did not prejudice defendant, since excluded items were merely cumulative, evidence against defendant was overwhelming, and omitted items were included in written notice of intent filed within three days of filing of defendant's discovery request.

4. Criminal Law ⇐1173.2(4)

Although trial judge incorrectly denied special jury charge detailing respective sentences on responsive verdicts returnable by jury since charge did not require "qualification, limitation, or explanation" and was "wholly correct and pertinent," no prejudice to defendant resulted where jury was made aware of sentences of responsive verdicts in defense counsel's closing arguments. LSA-C.Cr.P. arts. 729.5, 807 comment (c).

5. Criminal Law ⇐956.6(3)

Evidence of prior criminal record is admissible evidence in sentencing phase; it is relevant to character and propensities of offender. LSA-C.Cr.P. art. 905.2.

6. Criminal Law ⇐956.6(3), 1177

Admission of documentation of defendant's prior criminal record during opening statement of sentencing phase of trial was improper; however, error was harmless where defendant did not contend that the evidence would have been inadmissible if introduced at the proper time. LSA-C.Cr.P. art. 905.2.

7. Criminal Law ⇐1208.1(6)

If jury finds at least one aggravating circumstance it may consider recommend-

ing death penalty but is not bound to do so and can still recommend life imprisonment; additionally, if recommendation of death penalty is not unanimous, judge will impose sentence of life imprisonment without benefit of probation, parole or [illegible]mission of sentence.

8. Criminal Law ⇐723(1), 1171.1(6)

Prosecutor's comments about societal cost of life sentence, misspent tax dollars, future escapes, and more killings by defendant were improper; however, given statements by defendant that he had escaped on numerous occasions and that giving him more time was not going to bother him one bit, and his statement implying that he might have killed others, prosecutor's comment did not inject arbitrary factor into proceedings so as to invalidate death sentence. LSA-C.Cr.P. art. 905.2.

9. Homicide ⇐354

Means by which defendant put victim to death did not fall within category of cruel, heinous and atrocious crimes contemplated by statute which allows imposition of death sentence upon finding of statutory aggravating circumstance where victim was shot once in the back from distance of 12 feet with 20 gauge shotgun and it took no longer than one and one-half minutes for victim to die. LSA-C.Cr.P. art. 905.9.

10. Homicide ⇐354

Evidence, including defendant's admission that he stripped victim of his wallet which contained approximately $150, that defendant knew that victim would have large amount of cash on his person and that this was one reason defendant took victim hunting with him, and that defendant was thinking of shooting victim and taking his money, supported finding of aggravated circumstance that murder occurred during commission of robbery so as to support death sentence. LSA-C.Cr.P. art. 905.9.

11. Homicide ⇐354

Death sentence for first-degree murder committed in course of robbery was not disproportionate when compared to results of other single-shot armed robbery cases. LSA-C.Cr.P. arts. 905.2, 905.9; Sup.Ct. Rules, Rule 28 (C.Cr.P.Rule 905.9.1), 8 LSA-R.S.

William J. Guste, Jr., Atty. Gen., Barbara Rutledge, Asst. Atty. Gen., William E. Tilley, Dist. Atty., Edwin L. Cabra, Asst. Dist. Atty., for plaintiff-appellee.

James R. Mitchell, Leesville, for defendant-appellant.

DIXON, Chief Justice.

Ernest W. Busby III was convicted on February 15, 1984 of the first degree murder of John Reeves. According to the defendant's confession, Busby was angered when he discovered that Reeves had told Busby's girl friend, Ruthie Jones, that Busby had referred to her as a "whore." Busby confronted Reeves with this story, but Reeves refused to acknowledge that he had made the statement. The day after the incident Busby invited Reeves to go squirrel hunting, intending either to "stomp him with [his] hands ... or use that gun on him." While hunting Busby shot Reeves in the back from twelve feet away with a 20 gauge shotgun. Reeves "lay there gasping ... looked up at [Busby] ... asked [him] if [he] shot him ... and rolled over and died."

Busby checked Reeves' pulse, said a short prayer, and then covered the body with leaves and twigs after removing the victim's watch and a wallet containing approximately $150. Busby returned to 3B's Trailer Park where both he and the victim lived and ran a few errands, including picking the victim's daughter up from school. That evening he took his friends Danny and Gisela Humphrey out for drinks to celebrate her birthday.

On the following day Busby decided that prudence dictated that he leave Leesville. He traveled to Shreveport, using the victim's car, but was arrested by Caddo Parish authorities on December 5, 1983, four days after the shooting. The defendant was then transported back to Vernon Par-

ish where he was indicted by a grand jury for first degree murder.

Assignments of Error Nos. 1 and 3[1]

Assignment of Error No. 1 complains that the trial court erred in allowing the state's answers to discovery motions to be filed on the day of trial. Assignment of Error No. 3 claims that the admission into evidence of twelve items not included in the state's answer was erroneous.

Although trial was scheduled for February 13, the defendant's pretrial motions, including discovery requests and a request for bill of particulars, were not filed until February 10.[2] On the Friday that the motions were filed, Assistant District Attorney Edwin Cabra spoke with defense counsel and informed him of certain items of evidence which the state intended to introduce at trial. Three days later, on the morning of trial, the state filed a written notice of intent which included additional items not previously communicated to defense counsel.

Immediately prior to the commencement of trial, the defense objected to the late filing of answers to discovery and moved that the state be bound by the oral answers given the previous Friday. The trial court overruled the objection on the grounds that the state's notice of intent, filed within three days of defendant's requests for discovery, provided adequate notice to the defendant of the evidence that the state intended to use against him.

The disputed items include photographs of the victim's car (stolen by defendant), a map drawn by defendant which purported to show the location of the victim's wallet, several inculpatory oral statements made by Busby both to police and to various witnesses, and various *Miranda* warning cards and waiver of rights forms.

Code of Criminal Procedure article 729.5 lists the sanctions available to the trial judge should either party fail to comply with requests for discovery:

> "A. If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this Chapter or with an order issued pursuant to this Chapter, the court may order such party to permit the discovery or inspection, grant a continuance, order a mistrial on motion of the defendant, prohibit the party from introducing into evidence the subject matter not disclosed, or enter such other order, other than dismissal, as may be appropriate."

At the time of defense counsel's objection, the trial court specifically asked whether the defense desired to file a motion for a continuance, seemingly indicating that such a motion would be seriously entertained. The defense, however, responded that it did not wish the trial continued but only that the state be prevented from introducing any items not revealed the Friday before trial.

[1] Article 729.5 gives the trial judge wide latitude in choosing the appropriate sanction. Given the fact that the discovery exchanges occurred so close to the commencement of trial, the trial judge's suggestion of a continuance, instead of exclusion of the particular items, was preferable and appropriate.

[2, 3] In addition, the defendant has failed to allege that any prejudice resulted from the state's omission. The state's failure to comply with discovery requests does not constitute reversible error unless actual prejudice results to defendant. *State v. Vaccaro*, 411 So.2d 415 (La.1982). In this case, no prejudice resulted, since the excluded items were merely cumulative, and since the evidence against the defendant was overwhelming. There was nothing learned from the disputed items that was

1. Assignment of Error No. 2 was expressly abandoned by defendant in brief. We have reviewed it nevertheless and found it to be without merit.

2. Defense counsel's reason for the late filing was that the ruling on the defendant's capacity to stand trial was not made until February 9 and that under C.Cr.P. 642 no steps in the prosecution are permitted until a ruling is made on capacity to proceed, once that issue is raised.

not contained in the defendant's written confession or in his statements from the witness stand.

These assignments are without merit.

Assignments of Error Nos. 4 and 6

In these assignments defendant complains of the trial court's denial of a special jury charge detailing the respective sentences on the responsive verdicts returnable by the jury. The trial judge, although disallowing the charge, did permit defense counsel to argue the charge to the jury. The trial court based its ruling on Comment (c) of C.Cr.P. 807:

"...

"A requested special charge shall be given by the court if it does not require qualification, limitation, or explanation, and if it is wholly correct and pertinent. It need not be given if it is included in the general charge or in another special charge to be given."

. . . . . .

"(c) C.C.P. Art. 1793 and Fed.Rule 30 further provide that: 'The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury....' The purpose of the provision is to allow the parties to argue to the jury any point of law that the judge may refuse to charge. The provision is unnecessary, because each party in his argument to the jury will argue all points of law favorable to his side irrespective of the judge's decision to charge or not to charge according to the requests." Official Revision Comment (c).

[4] The trial judge was incorrect in denying the special charge since under the language of article 807, the charge did not require "qualification, limitation, or explanation" and was "wholly correct and pertinent." However, the jury was in fact made aware of the sentences of the responsive verdicts in defense counsel's closing arguments. Although it would have been preferable that the trial judge include the responsive sentences in his formal charge to the jury, his failure to do so does not constitute reversible error. As long as the jury was made aware of the substance of the charge in closing arguments, no prejudice to the defendant could have resulted.

These assignments are without merit.

Assignment of Error No. 5

This assignment of error concerns the trial judge's ruling during the sentencing phase which allowed the prosecution to introduce evidence during the opening statement. The evidence introduced was documentation of the defendant's prior criminal record. Defendant urges that since under C.Cr.P. 905.2 the procedure governing the sentencing phase "shall be the same as that provided for trial in the Code of Criminal Procedure," the admission of evidence during the opening statement was improper.

[5, 6] Defendant's contention is correct. Article 766 provides that the opening statement shall "set forth ... the nature of the evidence by which the state expects to prove the charge." There are no provisions for the actual admission of evidence during the opening statement. However, defendant does not contend that the evidence, had it been introduced at the proper time, was inadmissible. The evidence of a prior criminal record is admissible evidence in the sentencing phase; it is relevant to the "character and propensities of the offender." C.Cr.P. 905.2; *State v. Jordan*, 440 So.2d 716 (La.1983). Although the opening statement is not the appropriate time for the introduction of evidence, the error is harmless.

This assignment is without merit.

Capital Sentence Review

Code of Criminal Procedure article 905.9 and Louisiana Supreme Court Rule 28 require the review of every death sentence for excessiveness. Particularly this court considers the following three factors:

"...

(a) whether the sentence was imposed under the influence of passion, prejudice or any other arbitrary factors, and

(b) whether the evidence supports the jury's finding of a statutory aggravating circumstance, and

(c) whether the sentence is disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." Louisiana Supreme Court Rule 28 (C.Cr.P. 905.9.1).

The sanity commission report reveals that defendant, a white male, was twenty-four years old at the time of the crime. He is unmarried and has no children. Although defendant did not graduate from high school, he does have a G.E.D. He also attended college for approximately two years. He has a spotty work history and spent five months in the United States Navy before being discharged on the basis of his disruptive behavior. The sanity commission doctors found no evidence that defendant was suffering from a mental disease or defect or diminished capacity, although he had been committed to the Mandeville State Hospital at the age of twelve for approximately one year. That (involuntary) commitment had followed an attack by defendant on his mother with a butcher knife. The incident "appeared to be premeditated because [defendant] says he notified an ambulance before he attacked her." That incident also led to defendant's confinement at Louisiana Training Institute and anticipated his stormy and disordered life over the next ten years. The sanity commission concluded that the defendant was "a very rebellious type person against all authority."

Passion, Prejudice and Arbitrary Factors

The defendant and the victim were both white; racial prejudice was not an issue.

[7] The judge's jury instructions during the sentencing phase were a correct statement of the law. He informed the jurors that, although they had to find the existence of at least one aggravating circumstance before they could consider recommending the death penalty, they were not bound to recommend the death penalty if they did find the existence of an aggravating circumstance; they could still recommend life imprisonment. Additionally, the judge instructed the jurors that either recommendation must be unanimous and if they could not reach unanimity the law provided that he impose a sentence of life imprisonment without benefit of probation, parole or suspension of sentence.

The prosecutor argued strongly for the death penalty, but reminded the jurors that death sentences were now being carried out in several states. Defense counsel's closing argument stressed that jurors not be lulled into a false sense of security, thinking that if they recommended the death penalty it would not be carried out. He urged the jurors, if they gave the death penalty, to "give it with the appreciation that it'll be carried out."

However, the prosecutor's rebuttal argument touches upon two troublesome subjects. First, he stated that the jury *recommends* the sentence, but the judge *imposes* it:

> "Though it's difficult to stand before you ladies and gentlemen and ask you to consider imposing upon anyone the penalty of death, but in order to make your task easier, we'll state for you that first of all, you have a solemn obligation to live up to your oath. Second of all, that whatever you decide will be recommendations—and recommendations to the Judge, for the Judge to impose the death penalty. It will be the Judge that sentences this defendant to whatever the sentence might be. You make recommendations."

However, considering the prosecutor's comments in light of the judge's jury instructions, it does not seem that the jury was given the impression that the judge would not impose the sentence it recommended. In his opening comments to the jury during the penalty phase of the trial, the judge said: "The jury in a capital case is given the authority to make a binding recommendation to the trial judge as to the sentence that shall be imposed upon the defendant." In his instructions at the conclusion of the penalty phase, the judge told the jurors: "It now becomes your duty to

go through the second phase of this proceeding in order to make your recommendation as to the sentence that the Court should impose." Furthermore, as noted above, the judge told the jurors that he would impose a life sentence if they could not make a unanimous recommendation.

One other part of the prosecutor's rebuttal argument also deserves comment. The prosecutor closed with the following appeal to the jurors:

> "... I don't want any of you to violate your oath. But you have a duty. You have a duty to God ... to your conscience. And you have a duty to society. If you let Ernest Busby escape the next time it could be you. It could be me. It could be His Honor. It could be anybody...". We have no place for him in our society. Your tax dollars will be spent to care for him for the remainder of his natural life and if that's what you want to happen, I have no qualms with that.... It's your decision ... you won't be faulted. Don't do violence to your conscience. By the same token, think of your obligation to society."

[8] Although carefully hedged by the reminder to the jurors to vote their conscience, the prosecutor's remarks about the societal costs of a life sentence, misspent tax dollars, future escapes, more killings by defendant, were improper. *State v. Felde*, 422 So.2d 370 (La.1982). Nevertheless, in this case, as in *State v. Felde*, supra, at 388–89, the prosecutor at least had a factual basis for his remarks; defendant freely admitted at the hearing that he had escaped on numerous occasions and invited the jurors to give him death because "more time ain't going to bother me a bit."

Busby also stated that he had been "locked up off and on for the last twelve years." He also implied that he had killed others, saying: "I am sorry I killed the dude, but I did do it. I can't change that. I'm not going to say whether he was the first or the last one." Cross-examination stressed in great detail defendant's background and the time he had spent in correctional facilities of one type or another.

Given these statements by the defendant, it is obvious that the prosecutor's comments did not inject an arbitrary factor into the proceedings. It was rather the defendant's seeming disregard for human life, both his and others, which prompted the jury to impose a capital sentence.

Aggravating Circumstances

The prosecution argued and the jury found three aggravating circumstances: that the defendant had a significant prior history of criminal activity, that the offense was committed in an especially heinous, atrocious or cruel manner, and that the offense was committed during the perpetration of an armed robbery. In *State v. David*, 425 So.2d 1241 (La.1984), the term "significant prior history of criminal activity" was declared unconstitutionally vague; therefore, only the last two aggravating circumstances need be discussed.

The victim was shot once in the back from a distance of twelve feet with a 20 gauge shotgun. He collapsed, but lived long enough to ask the defendant if he had shot him. The defendant testified that it took no longer than one and one-half minutes for the victim to die. This assertion was undisputed by the prosecution.

[9] Although no one could consider a shotgun blast in the back less than cruel in the generally accepted meaning of the word, the means by which the defendant put the victim to death in this case do not fall within the category of the cruel, heinous and atrocious crimes contemplated by the statute. The test that we have consistently articulated is whether "there was torture or the pitiless infliction of unnecessary pain on the victim," *State v. Sonnier*, 402 So.2d 650, 658 (La.1981), clearly not the situation in this case.

More in line with the heinousness and cruelty embraced by the article are such cases as *State v. Rault*, 445 So.2d 1203 (La.1984); *State v. Flowers*, 441 So.2d 707 (La.1983); *State v. Willis*, 436 So.2d 553 (La.1983). In *State v. Rault*, the victim

was raped, strangled, stabbed in the neck and shot twice. In *State v. Flowers*, a seventy year old widow was severely beaten, raped and strangled in her home. In *State v. Willis*, the victim was taken blindfolded and naked to a remote area where she was tied spreadeagle and had her throat repeatedly slashed. She was also raped; the crime was committed by more than one perpetrator.

[10] The jury also found that the offense occurred during the commission of an armed robbery. The defendant admitted that he stripped the victim of his wallet which contained approximately $150. There is also evidence that the defendant knew that Reeves would have a large amount of cash on his person and that this was one reason the defendant took Reeves hunting with him. Busby admitted that he was aware that Reeves had recently cashed a large check. On the day prior to the robbery, Busby told his friend Danny Humphrey that he was thinking of taking Reeves into the woods, shooting him and taking his money in order to get money for Humphrey to fix his car. Although the defendant claimed that he was not serious at the time, the jury did not accept that explanation. The evidence, therefore, clearly supports the finding of this aggravated circumstance.

[11] The final question before the court is whether the sentence in this case is disproportionate to the penalty imposed, considering both the crime and the defendant. When compared to the results of other single shot armed robbery cases, the penalty is not disproportionate. See *State v. Wingo*, 457 So.2d 1159 (La.1984); *State v. Glass*, 455 So.2d 659 (La.1984); *State v. Knighton*, 436 So.2d 1141 (La.1983); *State v. James*, 431 So.2d 399 (La.1983); *State v. Lindsey*, 428 So.2d 420 (La.1983).

Accordingly, the defendant's conviction and sentence are affirmed.

LEMMON, J., concurs and assigns reasons.

WATSON, J., concurs but disagrees wi[illegible] the holding in *State v. David* concernin[illegible] prior criminal history.

CALOGERO, J., dissents and assigns [illegible] brief reasons.

CALOGERO, Justice, dissenting.

Defendant requested a jury charge concerning the penalties authorized for first and second degree murder, including that second degree murder carried a mandatory sentence of life imprisonment without benefit of probation, parole or suspension of sentence. The trial judge refused to give the charge. As the majority concedes, this was error. Unlike the majority, I find it impossible to conclude, with any degree of certainty, that the error was harmless. Had just one juror been swayed to persist in finding defendant guilty of second rather than first degree murder, defendant would not have been found guilty of first degree murder and thereafter exposed to the death penalty which was ultimately imposed.

STATE of Louisiana

v.

David RUSHING.

No. 84-KA-0991.

Supreme Court of Louisiana.

Jan. 14, 1985.

Rehearing Denied March 14, 1985.

Defendant was convicted in the Twenty-Second Judicial District Court, Parish of St. Tammany, A. Clayton James, J., of [illegible] degree murder, and he appealed. The Supreme Court, Blanche, J., held that [illegible] statement which was made by defendant's companion to a jailer a few days before defendant's trial and which was to the

Note 12

untary and had thus made them part of evidence for jury to consider and jurors were not instructed as to their duty with regard to confessions or effect of judge's ruling as to admissibility of confessions on that duty, defendants were prejudiced. State v. Hammler, Sup. 1973, 312 So. 306.

Art. 807. Special written charges

The state and the defendant shall have the right before argument to submit to the court special written charges for the jury. Such charges may be received by the court in its discretion after argument has begun. The party submitting the charges shall furnish a copy of the charges to the other party when the charges are submitted to the court.

A requested special charge shall be given by the court if it does not require qualification, limitation, or explanation, and if it is wholly correct and pertinent. It need not be given if it is included in the general charge or in another special charge to be given.

Official Revision Comment

(a) This article is based substantially on the Louisiana source provision, and the only change it makes in the law is the addition of the requirement that copies of the requested charges be given to the other party, a provision taken from Fed.Rule 30. This provision gives the other party sufficient time to prepare his arguments attacking the giving of the requested charge.

(b) The case of State v. Dooley, 208 La. 203, 23 So.2d 46 (1945), held that the general rule in former R.S. 15:390 authorizing both the state and the defendant to present requested written charges to the court, before argument began, was only directory and either party *might* request special charges after delivery of the general charge. This article codifies the rule of the Dooley case.

(c) C.C.P. Art. 1793 and Fed.Rule 30 further provide that: "The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury . . ." The purpose of the provision is to allow the parties to argue to the jury any point of law that the judge may refuse to charge. The provision is unnecessary, because each party in his argument to the jury will argue all points of law favorable to his side irrespective of the judge's decision to charge or not to charge according to the requests.

Historical Note

Sources:
New; *cf.* former R.S. 15:390; Fed. Rule 30.
Acts 1966, No. 310, § 1.

Prior Laws:
Acts 1928, No. 2, § 1, art. 390.

It is not within the power of the Supreme Court to expand the definition of homicide to include feticide. Id.

§ 30. First degree murder

First degree murder is the killing of a human being:

(1) When the offender has specific intent to kill or to inflict great bodily harm and is engaged in the perpetration or attempted perpetration of aggravated kidnapping, aggravated escape, aggravated arson, aggravated rape, aggravated burglary, armed robbery, or simple robbery;

(2) When the offender has a specific intent to kill or to inflict great bodily harm upon a fireman or peace officer engaged in the performance of his lawful duties;

(3) When the offender has a specific intent to kill or to inflict great bodily harm upon more than one person; or

(4) When the offender has specific intent to kill or inflict great bodily harm and has offered, has been offered, has given, or has received anything of value for the killing.

For the purposes of Paragraph (2) herein, the term peace officer is defined to include any constable, marshal, deputy marshal, sheriff, deputy sheriff, local or state policeman, game warden, federal law enforcement officer, jail or prison guard, parole officer, probation officer, judge, attorney general, assistant attorney general, attorney general's investigator, district attorney, assistant district attorney, or district attorney's investigator.

Whoever commits the crime of first degree murder shall be punished by death or life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence in accordance with the recommendation of the jury.

Amended by Acts 1975, No. 327, § 1; Acts 1976, No. 657, § 1; Acts 1979, No. 74, § 1, eff. June 29, 1979.

1979 Amendment: Rewrote this section, which had previously read: "First degree murder is the killing of a human being when the offender has a specific intent to kill or to inflict great bodily harm.

"Whoever commits the crime of first degree murder shall be punished by death or life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence in accordance with the recommendation of the jury."

Cross References

Labor by prisoners permitted, see R.S. 15:708.

Law Review Commentaries

Battered child: Louisiana's response to the cry. 42 Loyola L.Rev. (La.) 372 (1970-71).

Born alive doctrine: A legal anachronism. Louis Westerfield, 2 Southern U.L.Rev. 149 (1976).

Capital punishment—work of Louisiana legislature for 1976 regular session. 37 La.L.Rev. 197 (1976).

Capital punishment and Eighth Amendment. 51 Tulane L.Rev. 360 (1977).

Criminal Law—work of Louisiana legislature for 1977 regular session. 38 La.Rev. 125 (1977).

Criminal law—work of the legislature, 1978. 39 La.L.Rev. 227 (1978).

Death penalty now. Charles L. Black, Jr., 51 Tulane L.Rev. 429 (1977).

Developments in the law, 1982-1983: Criminal law. John S. Baker, Jr., 44 La.L.Rev. 279 (1983).

First-degree murder statutes and capital sentencing procedures. 24 Loyola L.Rev. (La.) 709 (1978).

"New" judicial solution: Occasions for and limits to judicial creativity. Albert Tate, Jr., 54 Tulane L.Rev. 877 (1980).

Perils of calibrating the death penalty through special definitions of murder. Catherine Hancock, 53 Tulane L.Rev. 829 (1979).

Presumptions in criminal law of Louisiana. 52 Tulane L.Rev. 793 (1978).

Role of mitigating circumstances in considering death penalty. 53 Tulane L.Rev. 608 (1979).

Selected legislation of the 1979 regular session—a student commentary. 40 La.L.Rev. 437 (1980).

Some questions considered in light of Louisiana felony-murder rule. 1 Southern U.L.Rev. 297 (1973).

United States Supreme Court and capital punishment: Uncertainty, ambiguity, and judicial

Note 265

Though issue has not been preserved for review, exception is made in capital case because court has obligation to examine record for passion, prejudice or arbitrary factors which may have contributed to death penalty recommendation. State v. Copeland, Sup.1982, 419 So.2d 899.

266. Conspiracy, review

In prosecution for criminal conspiracy to commit first-degree murder, contention that, because conspiracy charge against coconspirator had been dismissed, there could be no conspiracy involving only one conspirater, could not be raised on appeal where objection was not raised in trial court and could only be determined by inspection of evidence, even though dismissal occurred while appeal was pending; proper method for raising issue was by application for postconviction relief. State v. Richards, Sup. 1982, 426 So.2d 1314.

§ 30.1. Second degree murder

Second degree murder is the killing of a human being:

(1) When the offender has a specific intent to kill or to inflict great bodily harm; or

(2) When the offender is engaged in the perpetration or attempted perpetration of aggravated rape, aggravated arson, aggravated burglary, aggravated kidnapping, aggravated escape, armed robbery, or simple robbery, even though he has no intent to kill or to inflict great bodily harm.

Whoever commits the crime of second degree murder shall be punished by life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence.

Amended by Acts 1975, No. 380, § 1; Acts 1976, No. 657, § 2; Acts 1977, No. 121, § 1; Acts 1978, No. 796, § 1; Acts 1979, No. 74, § 1, eff. July 29, 1979.

1978 Amendment: Rewrote this section, which had previously read: "Second degree murder is:

"A. The killing of a human being when the offender is engaged in the perpetration or attempted perpetration of aggravated rape, aggravated arson, aggravated burglary, aggravated kidnapping, aggravated escape, armed robbery, or simple robbery, even though he has no intent to kill; or

"B. The killing of a human being when the offender has a specific intent to kill, under circumstances that would be first degree murder under Article 30, but the killing is accomplished without any of the aggravating circumstances listed in Article 905.4 of the Louisiana Code of Criminal Procedure.

"Whoever commits the crime of second degree murder shall be imprisoned at hard labor for life and shall not be eligible for parole, probation, or suspension of sentence for a period of forty years."

1979 Amendment: Added par. (1), designated par. (2) as such, and in the last, unnumbered paragraph substituted "parole, probation, or suspension of sentence" for "probation or suspension of sentence and shall not be eligible for parole for forty years".

Cross References

Labor by prisoners permitted, see R.S. 15:708.

Law Review Commentaries

Born alive doctrine: A legal anachronism. Louis Westerfield, 2 Southern U.L.Rev. 149 (1976).

Criminal law—work of Louisiana legislature for 1977 regular session. 38 La.L.Rev. 125 (1977).

Criminal law—work of the legislature, 1978. 39 La.L.Rev. 227 (1978).

First-degree murder statutes and capital sentencing procedures. 24 Loyola L.Rev. (La.) 709 (1978).

"New" judicial solution: Occasions for and limits to judicial creativity. Albert Tate, Jr., 54 Tulane L.Rev. 877 (1980).

Perils of calibrating the death penalty through special definitions of murder. Catherine Hancock, 53 Tulane L.Rev. 828 (1979).

Selected legislation of the 1979 regular session—a student commentary. 40 La.L.Rev. 437 (1980).

Some questions considered in light of Louisiana felony-murder rule. 1 Southern U.L.Rev. 297 (1975).

Work of the Louisiana appellate courts for the 1978–1979 term: Criminal law and procedure. Cheney C. Joseph, Jr., 40 La.L.Rev. 635 (1980).

United States Supreme Court

Guilty plea, explanation to defendant of intent necessary for second-degree murder, see Henderson v. Morgan, 1976, 96 S.Ct. 2253, 426 U.S. 637, 49 L.Ed.2d 108.

Notes of Decisions

Admissibility of evidence 3.1
Aggravating circumstances 40

ORIGINAL

Supreme Court, U.S.
FILED
AUG 23 1985
JOSEPH F. SPANIOL, JR.
CLERK

NUMBER: 84-6864

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1984

ERNEST BUSBY, PETITIONER

VERSUS

STATE OF LOUISIANA, RESPONDENT

RESPONSE TO WRIT OF CERTIORARI TO

THE LOUISIANA SUPREME COURT

WILLIAM J. GUSTE, JR., ATTORNEY GENERAL,
BARBARA RUTLEDGE, ASSISTANT ATTORNEY GENERAL,
WILLIAM E. TILLEY, DISTRICT ATTORNEY,
EDWIN L. CABRA, FIRST ASSISTANT DISTRICT ATTORNEY
THIRTIETH JUDICIAL DISTRICT COURT
P.O. BOX 1188
LEESVILLE, LOUISIANA 71446

45 p

STATEMENT OF THE CASE

The defendant, Ernest Busby, was tried and convicted of first degree murder in the Thirtieth Judicial District Court of the State of Louisiana, on February 15, 1984. Subsequent to the conviction as mandated by law a sentencing hearing was held and the jury returned a recommended sentence of death. The defendant was then sentenced to death by the Honorable Ted R. Broyles on April 5, 1984. An appeal to the Louisiana State Supreme Court followed and the conviction was affirmed on January 14, 1985.

TABLE OF AUTHORITIES

CASES	PAGE
State v. James, 431 So. 2d 399, (La. 1983)	5
State vs. Andrew Lee Jones, No. 85-KA-0005, (La. 1985)	5
Hopper v. Evans, 102 S. Ct. 2049 (1982)	5

STATUTES:

Article 807, Louisiana Code of Criminal Procedure	2

ARGUMENT

The petition by the defendant directs itself entirely to the trial judge's refusal to allow the defendant a special charge to the jury concerning the possible penalties for the lesser included offense of second degree murder.

At the outset the Court should be cognizant of the fact that although the trial court refused this special charge, the defendant was allowed to argue this point before the jury in his closing argument. The State does not agree that it was error to deny this special charge, but even if it was any prejudice to the defendant was removed by the trial court's allowing counsel to argue this point as such was harmless error as noted in the majority opinion of the Louisiana Supreme Court, a copy of which is attached as appendix A.

Code of Criminal Procedure Article 807 addresses special written charges as follows:

"Art. 807. Special written charges

> The state and the defendant shall have the right before argument to submit to the court special written charges for the jury. Such charges may be received by the court in its discretion after argument has begun. The party submitting the charges shall furnish a copy of the charges to the other party when the charges are submitted to the court.
>
> A requested special charge shall be given by the court if it does not require qualification, limitation, or explanation, and if it is wholly correct and pertinent. It need not be given if it is included in the general charge or in another special charge to be given.
>
> Source: Acts 1966, No. 310§ 1; cf. former R. S. 15:390; Fed. Rule 30.

Offical Revision Comment

(a) This article is based substantially on the Louisiana source provision, and the only change it makes in the law is the addition of the requirement that copies of the requested charges be given to the other party, a provision taken from Fed. Rule 30. This provision gives the other party sufficient time to prepare his arguments attacking the giving of the requested charge.

(b) The case of State v. Dooley, 208 La.. 203, 23 So. 2d 46 (1945), held that the general rule in former R. S. 15:390 authorizing both the state and the defendant to present requested written charges to the court, before argument began, was only directory and either party might request special charges after delivery of the general charge. This article codifies the rule of the Dooley case.

(c) C.C. P. Art. 1793 and Fed. Rule 30 further provide that: "The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury . . ." The purpose of the provision is to allow the parties to argue to the jury any point of law that the judge may refuse to charge. The provision is unnecessary, because each party in his argument to the jury will argue all points of law favorable to his side irrespective of the judge's decision to charge or not to charge according to the requests."

The trial record reflects the exchange between the court and counsel and the court's ruling on this point, to-wit: (Tr. P. 557-558; Tr. P. 589-591)

Tr. Vol. 4, Pg. 557, line 5 through line 15, Pg. 558:

"BY MR. MITCHELL:

Yes, Your Honor. I have what I'll mark as D-1, which is a request for special charge concerning punishment in this matter. I would request that the Court make this charge to the jury.

BY THE COURT:

We have conferred about this in chambers. I see no reason to refrain from giving the charge as to first degree murder because the jury is already aware of that - of the possible consequences. I believe that you both recited that to them on voir dire.

BY MR. MITCHELL:

Well . . .

But, I- I don't know of any authority to give the possible sentences that could be imposed with reference to the responsive verdicts.

Well, of course, that's the whole point of this, is that the jury is all well aware of what the punishment for first degree murder is. They have no knowledge before them of what other lesser included offenses- what punishment they carry.

BY THE COURT:

Do you have any authority for that?

BY MR. MITCHELL:

I don't have any authority, except my own . . . (inaudible) widsom. I understand that the State -- does the State have objection? I'll be delighted to-to. . .

BY MR. TILLEY:

Yes Sir, Your Honor, the State . . .

. . . to instruct the jury, if the State has no objection to it.

BY MR. TILLEY:

The State objected to the special jury charges as requested. In that event, I will deny the request and . . . Tr. P. 589, line 22, beginning with "I" through line 11, Pg. 591:

". . . I would also point out to you that the law in Louisiana with regard to second degree murder provided. . .

BY MR. TILLEY:

Your Honor, may we object and approach the bench?

(BENCH CONFERENCE)

BY THE COURT:

In reviewing this - since you spoke to me in chambers, I'm going to call your attention to Article -- I know what you're objecting to, because you indicated that you would object to it in chambers. But - if you'll read the last - this 807 and the footnote. Read the footnote to 807. I don't -- I want to . . . particulary this right in here. Where the Court denies the requested charge. It goes on the comment that Counsel can still argue it. I know that this may be stretching the point, but I don't want to -- I don't want to have any reversible error on such a . . . (inaudible) as this. Go ahead and lodge your objection if you wish and then I'm . . . (inaudible)-

BY MR. TILLEY:

Yes Sir. Your Honor, the State has objected or was about to enter an objection to Counsel for defendant relating to the jury the penalties for second degree murder. We feel that this is beyond or outside the scope of the closing argument and it is a matter to be left to the jury. Not-not for argument.

BY THE COURT:

> All right. Although the Court is inclined to agree with you, on principals which we are all familiar with, in view of -- in view of the provisions of Article 807 and in particular the comments -- Comment C or paragraph C, I'm going to permit him to do it. Note your objection to the ruling."

A trial judge is required to give a special requested charge only if it is wholly correct and pertinent and not otherwise covered by the general charge. State v. James, 431 So. 2d 399 (La. 1983); State v. Andrew Lee Jones, No. 85-KA-0005 (La. 1985-not yet reported); Hopper v. Evans, 102 S. Ct. 2049 (1982).

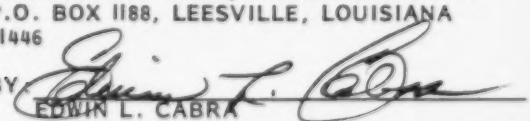
In the case at hand defense counsel argued to the jury over the State's objection exactly what the penalty would be if a verdict of guilty to the lesser included offense of second degree murder was imposed. Nonetheless, counsel would now argue this jury for some reason was not adequately apprised of this possible sentence prior to these deliberations. This argument simply does not take into account what actually transpired in the trial. Clearly, the jury knew its options and returned a unanimous verdict of guilty of first degree murder and under the law and the overwhelming evidence introduced at trial including the callous and cold-bloodied testimony of the defendant the verdict was proper and should be upheld.

CONCLUSION

Wherefore, the State of Louisiana prays that this response be deemed sufficient and that the defendant's Petition for Writ of Certiorari to the Louisiana Supreme Court be denied.

RESPECTFULLY SUBMITTED,

WILLIAM J. GUSTE, JR., ATTORNEY GENERAL
BARBARA RUTLEDGE, ASSISTANT ATTORNEY GENERAL, WILLIAM E. TILLEY, DISTRICT ATTORNEY, EDWIN L. CABRA, FIRST ASSISTANT DISTRICT ATTORNEY, 30TH JUDICIAL DISTRICT, PARISH OF VERNON
P.O. BOX 1188, LEESVILLE, LOUISIANA 71446

BY: 
EDWIN L. CABRA
FIRST ASSISTANT DISTRICT ATTORNEY

CERTIFICATE

I hereby certify that a copy of the foregoing has been served on defendant through his counsel, Mr. Mark G. Murov and Ms. Rita K. Ward, 833 Baronne Street, New Orleans, Louisiana 70113, by mail, postage prepaid, this the 13th day of August, 1985.

EDWIN L. CABRA
FIRST ASSISTANT DISTRICT ATTORNEY

APPENDIX A

JAN 14 1986

SUPREME COURT OF LOUISIANA

No. 84-KA-1089

STATE OF LOUISIANA

Versus

ERNEST BUSBY

Appeal from the
Thirtieth Judicial District Court,
Parish of Vernon, Louisiana.
Honorable Ted R. Broyles, Judge.

DIXON, Chief Justice

Ernest W. Busby III was convicted on February 15, 1984 of the first degree murder of John Reeves. According to the defendant's confession, Busby was angered when he discovered that Reeves had told Busby's girl friend, Ruthie Jones, that Busby had referred to her as a "whore." Busby confronted Reeves with this story, but Reeves refused to acknowledge that he had made the statement. The day after the incident Busby invited Reeves to go squirrel hunting, intending either to "stomp him with [his] hands . . . or use that gun on him." While hunting Busby shot Reeves in the back from twelve feet away with a 20 gauge shotgun. Reeves "lay there gasping . . . looked up at [Busby] . . . asked [him] if [he] shot him . . . and rolled over and died."

Busby checked Reeves' pulse, said a short prayer, and then covered the body with leaves and twigs after removing the victim's watch and a wallet containing approximately $150. Busby returned to 3B's Trailer Park

Calogero J. dissents and assigns brief reasons

Watson, J. concurs but disagrees with the holding in St. v. David concerning prior crimes evidence.

Justice Lemmon concurs and assigns reasons

where both he and the victim lived and ran a few errands, including picking the victim's daughter up from school. That evening he took his friends Danny and Gisela Humphrey out for drinks to celebrate her birthday.

On the following day Busby decided that prudence dictated that he leave Leesville. He traveled to Shreveport, using the victim's car, but was arrested by Caddo Parish authorities on December 5, 1983, four days after the shooting. The defendant was then transported back to Vernon Parish where he was indicted by a grand jury for first degree murder.

Assignments of Error Nos. 1 and 3[1]

Assignment of Error No. 1 complains that the trial court erred in allowing the state's answers to discovery motions to be filed on the day of trial. Assignment of Error No. 3 claims that the admission into evidence of twelve items not included in the state's answer was erroneous.

Although trial was scheduled for February 13, the defendant's pretrial motions, including discovery requests and a request for bill of particulars, were not filed until February 10.[2] On the Friday that the motions were filed, Assistant District Attorney Edwin Cabra spoke with defense counsel and informed him of certain items of evidence which

---

[1] Assignment of Error No. 2 was expressly abandoned by defendant in brief. We have reviewed it nevertheless and found it to be without merit.

[2] Defense counsel's reason for the late filing was that the ruling on the defendant's capacity to stand trial was not made until February 9 and that under C.Cr.P. 642 no steps in the prosecution are permitted until a ruling is made on capacity to proceed, once that issue is raised.

the state intended to introduce at trial. Three days later, on the morning of trial, the state filed a written notice of intent which included additional items not previously communicated to defense counsel.

Immediately prior to the commencement of trial, the defense objected to the late filing of answers to discovery and moved that the state be bound by the oral answers given the previous Friday. The trial court overruled the objection on the grounds that the state's notice of intent, filed within three days of defendant's requests for discovery, provided adequate notice to the defendant of the evidence that the state intended to use against him.

The disputed items include photographs of the victim's car (stolen by defendant), a map drawn by defendant which purported to show the location of the victim's wallet, several inculpatory oral statements made by Busby both to police and to various witnesses, and various Miranda warning cards and waiver of rights forms.

Code of Criminal Procedure article 729.5 lists the sanctions available to the trial judge should either party fail to comply with requests for discovery:

> "A. If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this Chapter or with an order issued pursuant to this Chapter, the court may order such party to permit the discovery or inspection, grant a continuance, order a mistrial on motion of the defendant, prohibit the party from introducing into evidence the subject matter not disclosed, or enter such other order, other than dismissal, as may be appropriate."

At the time of defense counsel's objection, the trial court specifically asked whether the defense desired

to file a motion for a continuance, seemingly indicating that such a motion would be seriously entertained. The defense, however, responded that it did not wish the trial continued but only that the state be prevented from introducing any items not revealed the Friday before trial.

Article 729.5 gives the trial judge wide latitude in choosing the appropriate sanction. Given the fact that the discovery exchanges occurred so close to the commencement of trial, the trial judge's suggestion of a continuance, instead of exclusion of the particular items, was preferable and appropriate.

In addition, the defendant has failed to allege that any prejudice resulted from the state's omission. The state's failure to comply with discovery requests does not constitute reversible error unless actual prejudice results to defendant. State v. Vaccaro, 411 So.2d 415 (La. 1982). In this case, no prejudice resulted, since the excluded items were merely cumulative, and since the evidence against the defendant was overwhelming. There was nothing learned from the disputed items that was not contained in the defendant's written confession or in his statements from the witness stand.

These assignments are without merit.

Assignments of Error Nos. 4 and 6

In these assignments defendant complains of the trial court's denial of a special jury charge detailing the respective sentences on the responsive verdicts returnable by the jury. The trial judge, although disallowing the charge, did permit defense counsel to argue the charge to the jury. The trial court based its ruling on Comment (c) of C.Cr.P. 807:

". . .

"A requested special charge shall be given by the court if it does not require qualification, limitation, or explanation, and if it is wholly correct and pertinent. It need not be given if it is included in the general charge or in another special charge to be given."

. . .

"(c) C.C.P. Art. 1793 and Fed.Rule 30 further provide that: 'The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury . . ..' The purpose of the provision is to allow the parties to argue to the jury any point of law that the judge may refuse to charge. The provision is unnecessary, because each party in his argument to the jury will argue all points of law favorable to his side irrespective of the judge's decision to charge or not to charge according to the requests." Official Revision Comment (c).

The trial judge was incorrect in denying the special charge since under the language of article 807, the charge did not require "qualification, limitation, or explanation" and was "wholly correct and pertinent." However, the jury was in fact made aware of the sentences of the responsive verdicts in defense counsel's closing arguments. Although it would have been preferable that the trial judge include the responsive sentences in his formal charge to the jury, his failure to do so does not constitute reversible error. As long as the jury was made aware of the substance of the charge in closing arguments, no prejudice to the defendant could have resulted.

These assignments are without merit.

Assignment of Error No. 5

This assignment of error concerns the trial judge's ruling during the sentencing phase which allowed the prosecution to introduce evidence during the opening

statement. The evidence introduced was documentation of the defendant's prior criminal record. Defendant urges that since under C.Cr.P. 905.2 the procedure governing the sentencing phase "shall be the same as that provided for trial in the Code of Criminal Procedure," the admission of evidence during the opening statement was improper.

Defendant's contention is correct. Article 766 provides that the opening statement shall "set forth . . . the nature of the evidence by which the state expects to prove the charge." There are no provisions for the actual admission of evidence during the opening statement. However, defendant does not contend that the evidence, had it been introduced at the proper time, was inadmissible. The evidence of a prior criminal record is admissible evidence in the sentencing phase; it is relevant to the "character and propensities of the offender." C.Cr.P. 905.2; State v. Jordan, 440 So.2d 716 (La. 1983). Although the opening statement is not the appropriate time for the introduction of evidence, the error is harmless.

This assignment is without merit.

Capital Sentence Review

Code of Criminal Procedure article 905.9 and Louisiana Supreme Court Rule 28 require the review of every death sentence for excessiveness. Particularly this court considers the following three factors:

> ". . .
>
> (a) whether the sentence was imposed under the influence of passion, prejudice or any other arbitrary factors, and
>
> (b) whether the evidence supports the jury's finding of a statutory aggravating circumstance, and

(c) whether the sentence is disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." Louisiana Supreme Court Rule 28 (C.Cr.P. 905.9.1).

The sanity commission report reveals that defendant, a white male, was twenty-four years old at the time of the crime. He is unmarried and has no children. Although defendant did not graduate from high school, he does have a G.E.D. He also attended college for approximately two years. He has a spotty work history and spent five months in the United States Navy before being discharged on the basis of his disruptive behavior. The sanity commission doctors found no evidence that defendant was suffering from a mental disease or defect or diminished capacity, although he had been committed to the Mandeville State Hospital at the age of twelve for approximately one year. That (involuntary) commitment had followed an attack by defendant on his mother with a butcher knife. The incident "appeared to be premeditated because [defendant] says he notified an ambulance before he attacked her." That incident also led to defendant's confinement at Louisiana Training Institute and anticipated his stormy and disordered life over the next ten years. The sanity commission concluded that the defendant was "a very rebellious type person against all authority."

Passion, Prejudice and Arbitrary Factors

The defendant and the victim were both white; racial prejudice was not an issue.

The judge's jury instructions during the sentencing phase were a correct statement of the law. He informed the jurors that, although they had to find the existence of at least one aggravating circumstance before

they could consider recommending the death penalty, they were not bound to recommend the death penalty if they did find the existence of an aggravating circumstance; they could still recommend life imprisonment. Additionally, the judge instructed the jurors that either recommendation must be unanimous and if they could not reach unanimity the law provided that he impose a sentence of life imprisonment without benefit of probation, parole or suspension of sentence

The prosecutor argued strongly for the death penalty, but reminded the jurors that death sentences were now being carried out in several states. Defense counsel's closing argument stressed that jurors not be lulled into a false sense of security, thinking that if they recommended the death penalty it would not be carried out. He urged the jurors, if they gave the death penalty, to "give it with the appreciation that it'll be carried out."

However, the prosecutor's rebuttal argument touches upon two troublesome subjects. First, he stated that the jury recommends the sentence, but the judge imposes it:

> "Ihough it's difficult to stand before you ladies and gentlemen and ask you to consider imposing upon anyone the penalty of death, but in order to make your task easier, we'll state for you that first of all, you have a solemn obligation to live up to your oath. Second of all, that whatever you decide will be recommendations - and recommendations to the Judge, for the Judge to impose the death penalty. It will be the Judge that sentences this defendant to whatever the sentence might be. You make recommendations."

However, considering the prosecutor's comments in light of the judge's jury instructions, it does not seem

that the jury was given the impression that the judge would not impose the sentence it recommended. In his opening comments to the jury during the penalty phase of the trial, the judge said: "The jury in a capital case is given the authority to make a binding recommendation to the trial judge as to the sentence that shall be imposed upon the defendant." In his instructions at the conclusion of the penalty phase, the judge told the jurors: "It now becomes your duty to go through the second phase of this proceeding in order to make your recommendation as to the sentence that the Court should impose." Furthermore, as noted above, the judge told the jurors that he would impose a life sentence if they could not make a unanimous recommendation.

One other part of the prosecutor's rebuttal argument also deserves comment. The prosecutor closed with the following appeal to the jurors:

> ". . . I don't want any of you to violate your oath. But you have a duty. You have a duty to God . . . to your conscience. And you have a duty to society. If you let Ernest Busby escape the next time it could be you. It could be me. It could be His Honor. It could be anybody. . . . We have no place for him in our society. Your tax dollars will be spent to care for him for the remainder of his natural life and if that's what you want to happen, I have no qualms with that. . . . It's your decision . . . you won't be faulted. Don't do violence to your conscience. By the same token, think of your obligation to society."

Although carefully hedged by the reminder to the jurors to vote their conscience, the prosecutor's remarks about the societal costs of a life sentence, misspent tax dollars, future escapes, more killings by defendant, were improper. State v. Felde, 422 So.2d 370 (La. 1982).

Nevertheless, in this case, as in State v. Felde, supra, at 388-89, the prosecutor at least had a factual basis for his remarks; defendant freely admitted at the hearing that he had escaped on numerous occasions and invited the jurors to give him death because "more time ain't going to bother me a bit."

Busby also stated that he had been "locked up off and on for the last twelve years." He also implied that he had killed others, saying: "I am sorry I killed the dude, but I did do it. I can't change that. I'm not going to say whether he was the first or the last one." Cross-examination stressed in great detail defendant's background and the time he had spent in correctional facilities of one type or another.

Given these statements by the defendant, it is obvious that the prosecutor's comments did not inject an arbitrary factor into the proceedings. It was rather the defendant's seeming disregard for human life, both his and others, which prompted the jury to impose a capital sentence.

Aggravating Circumstances

The prosecution argued and the jury found three aggravating circumstances: that the defendant had a significant prior history of criminal activity, that the offense was committed in an especially heinous, atrocious or cruel manner, and that the offense was committed during the perpetration of an armed robbery. In State v. David, ____ So.2d _____(La. 1984) (No. 82-KA-0150), the term "significant prior history of criminal activity" was declared unconstitutionally vague; therefore, only the last two aggravating circumstances need be discussed.

The victim was shot once in the back from a distance of twelve feet with a 20 gauge shotgun. He collapsed, but lived long enough to ask the defendant if he had shot him. The defendant testified that it took no longer than one and one-half minutes for the victim to die. This assertion was undisputed by the prosecution.

Although no one could consider a shotgun blast in the back less than cruel in the generally accepted meaning of the word, the means by which the defendant put the victim to death in this case do not fall within the category of the cruel, heinous and atrocious crimes contemplated by the statute. The test that we have consistently articulated is whether "there was torture or the pitiless infliction of unnecessary pain on the victim," State v. Sonnier, 402 So.2d 650, 658 (La. 1981), clearly not the situation in this case.

More in line with the heinousness and cruelty embraced by the article are such cases as State v. Rault, 445 So.2d 1203 (La. 1984); State v. Flowers, 441 So.2d 707 (La. 1983); State v. Willie, 436 So.2d 553 (La. 1983). In State v. Rault, the victim was raped, strangled, stabbed in the neck and shot twice. In State v. Flowers, a seventy year old widow was severely beaten, raped and strangled in her home. In State v. Willie, the victim was taken blindfolded and naked to a remote area where she was tied spreadeagle and had her throat repeatedly slashed. She was also raped; the crime was committed by more than one perpetrator.

The jury also found that the offense occurred during the commission of an armed robbery. The defendant admitted that he stripped the victim of his wallet which

contained approximately $150. There is also evidence that the defendant knew that Reeves would have a large amount of cash on his person and that this was one reason the defendant took Reeves hunting with him. Busby admitted that he was aware that Reeves had recently cashed a large check. On the day prior to the robbery, Busby told his friend Danny Humphrey that he was thinking of taking Reeves into the woods, shooting him and taking his money in order to get money for Humphrey to fix his car. Although the defendant claimed that he was not serious at the time, the jury did not accept that explanation. The evidence, therefore, clearly supports the finding of this aggravated circumstance.

The final question before the court is whether the sentence in this case is disproportionate to the penalty imposed, considering both the crime and the defendant. When compared to the results of other single shot armed robbery cases, the penalty is not disproportionate. See State v. Wingo, 457 So.2d 1159 (La. 1984); State v. Glass, 455 So.2d 659 (La. 1984); State v. Knighton, 436 So.2d 1141 (La. 1983); State v. James, 431 So.2d 399 (La. 1983); State v. Lindsey, 428 So.2d 420 (La. 1983).

Accordingly, the defendant's conviction and sentence are affirmed.

SUPREME COURT OF LOUISIANA

STATE OF LOUISIANA

versus NO. 84-KA-1089

ERNEST BUSBY

CALOGERO, Justice, dissenting

Defendant requested a jury charge concerning the penalties authorized for first and second degree murder, including that second degree murder carried a mandatory sentence of life imprisonment without benefit of probation, parole or suspension of sentence. The trial judge refused to give the charge. As the majority concedes, this was error. Unlike the majority, I find it impossible to conclude, with any degree of certainty, that the error was harmless. Had just one juror been swayed to persist in finding defendant guilty of second rather than first degree murder, defendant would not have been found guilty of first degree murder and thereafter exposed to the death penalty which was ultimately imposed.

NUMBER 38,380

STATE OF LOUISIANA	:	30TH JUDICIAL DISTRICT COURT
VERSUS	:	STATE OF LOUISIANA
ERNEST BUSBY	:	PARISH OF VERNON

INSTRUCTIONS TO THE JURY

MEMBERS OF THE JURY:

It is now my duty to instruct you on the law that applies to your deliberations. It is your duty to follow these instructions in reaching your verdict. Although you are the sole judges of the law and the facts on the question of guilt or innocence, you have the duty to accept and apply the law as given by the court. You must decide the facts from the testimony and other evidence and apply the law to those facts in reaching your verdict.

You must not single out any of these instructions and disregard others. The order in which the instructions are given does not indicate that one instruction is more important than another.

If I have given you the impression that I have an opinion regarding any fact in this case, you are to disregard that impression. If I have given the impression that I have an opinion concerning the guilt or innocence of the defendant, you are to disregard that impression.

BURDEN OF PROOF; PRESUMPTION OF INNOCENCE; REASONABLE DOUBT

The defendant is presumed to be innocent until each element of the crime necessary to constitute his guilt is proven beyond a reasonable doubt. The defendant is not required to prove that he is innocent. Thus, the defendant begins the trial with a clean slate.

The burden is upon the state to prove the defendant's guilt beyond a reasonable doubt. In considering the evidence, you must give the defendant the benefit of every reasonable doubt arising out of the evidence or out of the lack of evidence. If you are not convinced of the guilt of the defendant beyond a reasonable doubt, you must find him not guilty.

While the state must prove guilt beyond a reasonable doubt, it does not have to prove guilt beyond all possible doubt. Reasonable doubt is doubt based on reason and common sense and is present when, after you have carefully considered all the evidence, you cannot say that you are firmly convinced of the truth of the charge.

PROVINCE OF THE JURY: WEIGHT AND CREDIBILITY OF EVIDENCE

You must determine the facts only from the evidence presented by the testimony of witnesses and documents which the court has permitted the parties to introduce. You should not consider any evidence held to be inadmissibile or to which an objection was sustained.

In weighing the testimony of the witnesses the jury should consider their relationship to the parties, their manner of testifying, their candor, fairness and intelligence and the

extent to which any witness has been confirmed or contradicted if at all by other credible evidence. You can believe all or part of the testimony that a witness gives, or you may disbelieve all or part of the testimony. Your function is to arrive at what you believe to be the true facts. You should rely upon your own judgment, your own common sense, the experience you have gained from your everyday affairs. In weighing the evidence and determining the weight to be given it, you are the exclusive judges of the facts proved, of the credibility of witnesses and the weight to be given their testimony.

STATEMENTS BY COUNSEL

You are also charged that neither the opening statements nor the final arguments of the State and the defense constitute evidence. They are not to be considered by you as evidence. In presenting their arguments to the jury, the attorneys who are participating in the trial may discuss the facts as well as the law, and in discussing the evidence it is proper for them to state to you the conclusions which they have reached as to what facts have been proved and what facts have not been proved. A statement made by anyone during an opening statement or in closing arguments relating to the facts in this case, however, does not constitute evidence or proof of those facts, and it is not to be considered by you as evidence. It is simply their interpretation of the evidence. You, of course, should carefully consider all of the arguments presented by counsel, and then with equal care you should analyze the evidence presented during the trial upon which those arguments are based.

DIRECT AND CIRCUMSTANTIAL EVIDENCE

There are two methods by which facts may be established: by direct evidence and by circumstantial evidence. Evidence is said to be direct when it tends immediately to establish the main fact to be proved, leaving nothing for inference. The testimony of witnesses to facts which they have actually seen, heard or experienced, is direct evidence of those facts. Written documents constitute direct evidence of the contents of those documents, and any other form of evidence which tends to prove positively a fact, leaving nothing for inference, is direct evidence of that fact.

Circumstantial evidence is evidence which does not immediately or directly tend to establish the fact to be proved, but it does tend to prove other facts and circumstances from which it logically may be inferred, reasoned or concluded that the main fact is true.

Circumstantial evidence is good evidence, and, if it meets the test which our laws provide for that type of proof, a verdict of guilty can be rendered based on circumstantial evidence alone. In a criminal case, when a conviction must be based solely on circumstantial evidence, the rule is: assuming every fact to be proved that the evidence tends to prove, in order to convict, it must exclude every reasonable hypothesis of innocence. To justify a verdict of guilty on circumstantial evidence alone, the evidence not only must be consistent with the guilt of the accused, but it also must be inconsistent with any other reasonable hypothesis or explanation.

It is entirely within your province to determine whether the evidence offered is direct or circumstantial and whether it is

sufficient to establish the guilt of the defendant under the rules stated in this charge.

EXPERT TESTIMONY

We shall now discuss expert testimony. Expert witnesses are persons who are learned in a particular science, trade or profession. They are permitted to express their opinion upon matters pertaining to the field in which they are trained. The relative weight and sufficiency of expert testimony, however, is exclusively within your province as a jury to decide, considering the ability and training of the witness, his actions upon the witness stand, the weight and process of reasoning by which he has supported his opinion, the relative opportunities for study or observation of the matters about which he testifies and any other matters which serve to illuminate his statements. You may deal with such an opinion as you please, giving it credence or not, as your own experience or general knowledge of the subject may dictate.

THE EFFECT OF THE INDICTMENT

This prosecution was instituted by means of an indictment returned by the Vernon Parish Grand Jury. A grand jury is merely an accusatory body and you should not regard the indictment against the accused as evidence, or be influenced thereby in arriving at your verdict.

PRIVILEGE OF DEFENDANT NOT TO TESTIFY

A defendant in a criminal case is never required to take the stand and testify in his own behalf; and if he does not do so, that fact cannot be considered as any indication or inference of guilt.

If he chooses to testify, however, he is a competent witness and his testimony is to be judged in the same way as any other

witness. You have the right to believe him or not, just as he impresses you as to the truth or falsity of his testimony.

THE CHARGE

The defendant, Ernest Busby, is charged with first degree murder. L.R.S. 14:30 (1) defines first degree murder as follows:

> "First degree murder is the killing of a human being:
>
> (1) When the offender has specific intent to kill or to inflict great bodily harm and is engaged in the perpetration or attempted perpetration of aggravated kidnapping, aggravated escape, aggravated arson, aggravated rape aggravated burglary, armed robbery, or simple robbery;"

Since it is the theory of the State that the defendant was engaged in the perpetration or attempted perpetration of armed robbery, it is necessary for me to define those offenses.

> "A. Armed robbery is the taking of anything of value belonging to another from the person of another or that is in the immediate control of another, by use of force or intimidation, while armed with a dangerous weapon."

An attempt is defined as follows by R.S.14:27:

> "A. Any person who, having a specific intent to commit a crime, does or omits an act for the purpose of and tending directly toward the accomplishing of his object is guilty of an attempt to commit the offense intended; and it shall be immaterial whether, under the circumstances, he would have actually accomplished his purpose.
>
> B. Mere preparation to commit a crime shall not be sufficient to constitute an attempt; but lying in wait with a dangerous weapon with the intent to commit a crime, or searching for the intended victim with a dangerous weapon with the intent to commit a crime, shall be sufficient to constitute an attempt to commit the offense intended.

C. An attempt is a separate but lesser grade of the intended crime; and any person may be convicted of an attempt to commit a crime, although it appears on the trial that the crime intended or attempted was actually perpetrated by such person in pursuance of such attempt."

Since specific intent is an essential element of the offense of first degree murder and specific intent to commit an armed robbery or attempted armed robbery, it is necessary for me to define that for you. R.S.14:10 defines specific criminal intent as follows:

"(1) Specific criminal intent is that state of mind which exists when the circumstances indicate that the offender actively desired the prescribed criminal consequences to follow his act or failure to act."

To determine whether or not there was a specific intent you may consider all of the facts and circumstances established by the evidence including the conduct and actions of the accused.

Intent being a condition of mind, it is rarely susceptible of proof except circumstantially. One cannot see, feel or hear or touch intent. One's intent in the doing of any particular act is usually arrived at by a purpose of deduction and inference.

Therefore, in order to find this defendant guilty of first degree murder you must find:

(1) That the defendant, Ernest Busby, killed John Reeves; and

(2) That the defendant acted with a specific intent to kill or to inflict great bodily harm; and

(3) That the defendant was engaged in the commission or attempted commission of the offense of armed robbery;

(4) That the offense was committed in Vernon Parish, Louisiana;

(5) That the offense was committed on or about the 1st of December, 1983, but I charge you that it is not necessary for the State to prove that it occurred on that exact date.

Second degree murder and manslaughter are among the responsive verdicts in this case so it is my duty to define those offenses for you.

"Second degree murder is the killing of a human being:

(1) When the offender has a specific intent to kill or to inflict great bodily harm; or

(2) When the offender is engaged in the perpetration or attempted perpetration of aggravated rape, aggravated arson, aggravated burglary, aggravated kidnapping, aggravated escape, armed robbery or simple robbery, even though he has no intent to kill or to inflict great bodily harm."

Thus, in order to convict the defendant of second degree murder, you must find:

(1) That the defendant killed John Reeves and that he acted with a specific intent to kill or inflict great bodily harm; or

(2) That the defendant, Busby, killed John Reeves and was engaged in the perpetration or attempted perpetration of armed robbery, even though he had no intent to kill or to inflict great bodily harm.

R.S.14:31 defines manslaughter as follows:

"(1) A homicide which would be murder under either

Article 30 (first degree murder) or Article 30.1 (second degree murder), but the offense is committed in sudden passion or heat of blood immediately caused by provocation sufficient to deprive an average person of his self control and cool reflection. Provocation shall not reduce a homicide to manslaughter if the jury finds that the offender's blood had actually cooled, or that an average person's blood would have cooled, at the time the offense was committed; or

(2) A homicide committed, without any intent to cause death or great bodily harm.

(a) When the offender is engaged in the perpetration or attempted perpetration of any felony not enumerated in Articles 30 or 30.1, or of any intentional misdemeanor directly affecting the person; or

(b) When the offender is resisting lawful arrest by means, or in a manner, not inherently dangerous, and the circumstances are such that the killing would not be murder under Articles 30 or 30.1."

Thus in order to convict the defendant of manslaughter, you must find:

(1) That the defendant, Busby, killed John Reeves; and

(2) That the defendant had a specific intent to kill or to inflict great bodily harm; and

(3) That the killing was committed in sudden passion or heat of blood immediately caused by provocation sufficient to deprive an average person of his self control and cool reflection.

INSANITY PLEA

In this case, the defendant has entered a plea of "not guilty and not guilty by reason of insanity". Considering this plea, you must first determine whether or not the defendant committed the offense charged, first degree murder, or

either of the offenses responsive thereto, namely, second degree murder or manslaughter, which have been defined. Unless you find beyond a reasonable doubt that the defendant committed the offense charged, or one of the said offenses responsive thereto, you must find the defendant not guilty. If you find beyond a resonable doub that the defendant did in fact commit the offense charged, or one of the offenses responsive thereto, then you must determine whether he was insane at the time the offense was committed.

The defendant has the burden of proving his insanity at the time of the commission of the offense by a preponderance of the evidence. Thus, the defendant must establish that it is more probable than not that he was insane at the time of the commission of the crime.

Insanity at the time of the commission of a crime exempts the offender from criminal responsibility. If the circumstances indicate that because of a mental disease or mental defect the defendant was incapable of distinquishing between right and wrong with reference to the conduct in question the defendant must be found not guilty by reason of insanity.

In determining the question of the sanity or insanity of the defendant at the time of the commission of an offense, you must consider all of the evidence bearing on the defendant's mental condition, including the testimony of other witnesses and experts, if any, and the conduct and actions of the defendant.

Thus, if you find:

(1) That the State proved beyond a reasonable doubt that the defendant did in fact commit murder in

the first degree, or second degree murder, or manslaughter; and

(2) That the defendant established by a preponderance of the evidence that he was unable to distinquish right from wrong with respect to the conduct in question at the time of the offense;

then your verdict must be "not guilty by reason of insanity".

If a verdict of not guilty by reason of insanity is returned in case of this nature, the Court shall commit the defendant to a proper state mental institution or to a private mental institution approved by the court for custody, care and treatment.

The defendant shall not be released until the Court determines that he can be released without danger to himself or to others. A hearing on that issue, however, could be invoked by the defendant at anytime following the sentencing.

RESPONSIVE VERDICTS

After having considered the evidence adduced, if you find the accused guilty beyond a reasonable doubt then it will be your duty to convict by your verdict. On the other hand, if you have a reasonable doubt that the defendant is guilty, then you should acquit. All twelve of you must concur in order to render a verdict. These are the possible verdicts:

(1) Guilty.

(2) Guilty of second degree murder.

(3) Guilty of manslaughter.

(4) Not guilty.

(5) Not guilty by reason of insanity.

There is no formal requirement as to the language of the verdict except that it should clearly convey the intention of the jury. The document I hand you will set forth as a suggestion only the form of the possible verdicts. The order in which these appear should not be construed as a suggestion by the Court, however, as to which verdict you should return.

When you retire to the jury room, you should select one of your members as foreman, whether male or female, whose duty it will be to conduct your deliberations, and to write on the back of the form your verdict and date it as foreman and speak for you when you return to court. When you arrive at your verdict write it out in full on the back of the form, date it and the foreman must sign it.

The bailiff will be in attendance and if you have any inquiry you should let the bailiff know and I shall order you back into the courtroom. You may now retire and begin your deliberations.

Leesville, Louisiana, this _____ day of February, 1984.

_____
DISTRICT JUDGE
DIVISION B

NUMBER 38,380

STATE OF LOUISIANA	:	30TH JUDICIAL DISTRICT COURT
VERSUS	:	STATE OF LOUISIANA
ERNEST BUSBY	:	PARISH OF VERNON

RESPONSIVE VERDICTS

LADIES AND GENTLEMEN OF THE JURY:

The following is a list of the possible verdicts responsive to the charge of first degree murder. Only one of these may be returned. After you have arrived at your verdict, your foreman, on the back of this page, should write the date of the verdict, and then below that, the verdict you have reached and the foreman should sign his name beneath. After his signature, he may write the word "Foreman."

1. February _____, 1984.
We, the jury, find the accused guilty as charged.

_____
Foreman

2. February _____, 1984.
We, the jury, find the accused guilty of second degree murder.

_____
Foreman

3. February _____, 1984.
We, the jury, find the accused guilty of manslaughter.

_____
Foreman

4. February _____, 1984.
We, the jury, find the accused not guilty.

_____
Foreman

5. February _____, 1984.
We, the jury, find the accused not guilty by reason of insanity.

_____
Foreman

Handed to the jury this _____ day of February, 1984.

Leesville, Louisiana.

_____
DISTRICT JUDGE
DIVISION B

SUPREME COURT OF THE UNITED STATES

ERNEST BUSBY *v.* LOUISIANA

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

No. 84–6864. Decided October 7, 1985

The petition for writ of certiorari is denied.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN and JUSTICE BLACKMUN join, dissenting from denial of certiorari.

Once again this Court has declined to correct an error of constitutional magnitude with a defendant's life in the balance. The petitioner's death sentence was unconstitutionally imposed under last Term's decision in *Caldwell* v. *Mississippi*, —— U. S. —— (1985), and this Court's refusal to vacate that sentence is an unwarranted departure from procedures that we follow routinely in the most insignificant case.

I

The petitioner was convicted of first-degree murder. At the sentencing phase of his trial, his counsel attempted to impress upon the jury the significance of its role, in light of the growing number of executions in Louisiana and the nation as a whole. Counsel admonished the jurors that, should they decide upon the death penalty, they should "give it with the appreciation that it'll be carried out." *State* v. *Busby*, 464 So. 2d 262, 266 (La. 1985). The prosecutor responded by arguing to the jury:

> "Though it's difficult to stand before you ladies and gentlemen and ask you to consider imposing upon anyone the penalty of death, but in order to make your task easier, we'll state for you that first of all, you have a solemn obligation to live up to your oath. Second of all, that whatever you decide will be recommendations—and recommendations to the Judge, for the Judge to impose the

> death penalty. It will be the Judge that sentences this defendant to whatever the sentence might be. You make recommendations." *Ibid.*

The jury sentenced petitioner to death.

II

After the Louisiana Supreme Court had affirmed petitioner's conviction and death sentence, and after his petition for certiorari had been filed, this Court decided *Caldwell.** There, the Court held that "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." *Id.*, at ——. In *Caldwell*, the prosecutor argued to the jury that the state supreme court would automatically review the death sentence. This Court noted that the jury might not understand the limits on appellate review, and might conclude that the ultimate determination of the appropriateness of a death sentence for that defendant would lie with the court. *Id.*, at ——. Furthermore, whether or not the jury was misled as to the appellate court's function, it might decide to "delegate" its responsibility to the court. *Id.*, at ——.

In the present case, we need not speculate about the misleading nature of the prosecutor's argument, for it flatly misstated Louisiana law. In Louisiana, a jury's decision in favor of death is binding on the court. La. Code Crim. Proc. Ann., Art. 905.8 (West 1984). Thus, the prosecutor's argument in this case was not an "accurate statement of a potential sentencing alternative," as in *California* v. *Ramos*, 463 U. S. 992, 1009 (1983); cf. *Caldwell*, *supra*, at ——

*This chronology explains the petitioner's failure to raise the *Caldwell* violation in his petition for certiorari. This Court, of course, may correct a plain error not presented in the petition for certiorari. *Washington* v. *Davis*, 426 U. S. 229, 238 (1976). The Louisiana Supreme Court expresaly decided the issue, so there is no jurisdictional bar to our considering it.

(O'CONNOR, J., concurring in part and concurring in the judgment). Rather, the prosecutor's argument urged the jury "to minimize the importance of its role." *id.*, at ——, with statements that were both improper under *Caldwell* and factually inaccurate.

Although the Louisiana Supreme Court acknowledged that the prosecutor's remarks were "troublesome," 464 So. 2d, at 266, it concluded that the jury was not misled. The court noted that the trial judge had remarked to the jury, at the *beginning* of the sentencing phase, that the jury "is given the authority to make a binding recommendation to the trial judge as to the sentence." *Ibid.* The judge had also stated that he would impose life imprisonment if the jury could not reach a unanimous recommendation. *Id.*, at 267.

Those statements are inadequate to cure the prosecutor's inaccurate remarks. The judge did not correct the prosecutor's statements in his charge, nor did he acknowledge the binding effect of the jury's decision. Indeed, he compounded the error by telling the jurors that it was their duty "to make your recommendation as to the sentence that the Court should impose." *Ibid.* Because the prosecutor had affirmatively and unambiguously informed the jury that the ultimate responsibility for the decision rested with the judge, the jury could easily have believed that its decision to impose the death penalty was not automatically binding. In this situation, one cannot possibly conclude that the improper argument "had no effect on the sentencing decision," *Caldwell*, *supra*, at ——. Petitioner's death sentence, therefore, cannot stand.

III

The death sentence in this case was imposed in violation of the Eighth and Fourteenth Amendments as interpreted in *Caldwell*, *supra*. Our usual practice when an intervening decision of the Court may affect a lower court's decision is to grant the petition, vacate the judgment or sentence as appropriate, and remand for further consideration in light

of the intervening case. See, *e. g.*, *Wainwright* v. *Henry*, 463 U. S. 1223 (1983). Because the Court has declined to follow our general practice, with such enormous consequences for the petitioner, I dissent.